IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1055 of 1995

With

CRIMINAL APPEAL No. 1135 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge

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BABBANBHAI SNANTARAM RODE - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MRS SHILPA R SHAH for Appellant(s) : 1,
MR K.T. DAVE APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 13/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 These appeals are directed against the judgment and order dated 4th October, 1995 passed by the learned Addl. Sessions Judge, Court No. 18, City Civil and Sessions Court, Ahmedabad in Sessions Case No. 228 of 1994 whereby, the appellant was convicted for offences punishable u/s. 498(A) & 306 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC" for short) and was sentenced to undergo Simple Imprisonment for a period of one and a half years with fine of Rs.150/- for offence u/s. 498(A) of IPC; and Rigorous Imprisonment for a period of five years with fine of Rs.150/- for offence u/s. 306 of IPC. Both the sentences were ordered to run concurrently. The appellant was also given the benefit of set-off.

2.0 The facts in a nutshell are as under ;

The appellant was residing with his family consisting of his wife and four children in Sejpur area of Ahmedabad City and was engaged in the production of

flavoring agent (*'chamcham'*) used while consuming tobacco. The wife of the appellant, apart from doing household work, was also working in a factory engaged in the production of soaps.

2.1 On 14.04.1994, at around 1700 hours, the appellant went to the place of employment of his wife and informed her to come back home. When the wife of the appellant and their elder most daughter - Nitaben reached home, the appellant started quarreling with her by alleging that she was involved in extra-marital affairs and that she used to roam about here and there instead of attending her work-place.

2.2 Thereafter, on account of some instigation by the appellant, the wife of the appellant consumed kerosene and also poured some quantity on herself and set herself ablaze. On noticing the same, the appellant extinguished the fire with the help of a mattress. Thereafter, she was taken to the Hospital for necessary medical treatment.

2.3 On the basis of the statement of the wife of the appellant, a complaint was registered vide I-C.R. No. 126 of 1994 with Naroda Police Station. Her Dying Declaration was also recorded by the Executive Magistrate on that day itself. On 19.04.1994, the wife of the appellant expired.

2.4 On 25.04.1994 the appellant was arrested and produced before the Court of learned Metropolitan Magistrate, Ahmedabad. Since the case was triable by the Court of Sessions, the learned Magistrate committed the case to the City Civil and Sessions Court, Ahmedabad and Sessions Case No. 228 of 1994 was registered and the appellant came to be tried for the alleged offence. Ultimately, the appellant was found guilty of the alleged offence and the impugned judgment and order came to be passed. Criminal Appeal No. 1055 of 1995 has been preferred praying to quash and set aside the impugned judgment and order while Criminal Appeal No. 1135 of 1995 has been preferred praying to enhance the sentence awarded by the trial Court.

3.0 Ms. Shilpa R. Shah learned Advocate for the appellant has submitted that the deceased - wife of the appellant was very argumentative and arrogant in nature on account of which frequent disputes used to take place between them. She has contented that the case of the prosecution is mainly based on the evidence led by PW – 1 and PW – 2 who have clearly deposed in favour of the appellant. Hence, in the absence of cogent evidence on record, the trial Court ought not to have recorded the conviction of the appellant.

3.1 Learned Advocate has further submitted that the Dying Declaration cannot be said to be a reliable piece of evidence since the same has not been independently given but, has been given as per the directions of the mother-in-law of the appellant. Hence, the conviction recorded by the trial Court relying on the said Dying Declaration is illegal and erroneous and deserves to be quashed and set aside.

3.2 Learned Advocate has further submitted that since the marriage life of the appellant and the deceased wife was of more than ten years, presumption could not be drawn against the appellant in view of the provisions of Section 113(A) of the Indian Evidence Act. She has, therefore, submitted that considering the facts and circumstances of the case, the trial Court has committed serious error of law and on facts in convicting the appellant for the alleged offence. Hence, the impugned judgment and order passed by the trial Court deserves to be quashed and set aside.

4.0 On the other hand, Mr. K. T. Dave learned APP has submitted that the trial Court has recorded conviction of the appellant after appreciating the entire evidence available on record in the form of depositions of the witnesses, the Dying Declaration and the medical evidence. He has submitted that though the two witnesses, viz. PW – 1 & PW – 2 have led contrary evidence in their cross-examinations, the main evidence which is sufficient to record the conviction of

the appellant, is the Dying Declaration of the deceased, which is supported by the deposition of the Executive Magistrate, the Investigating Officer and the complaint filed by the deceased herself.

4.1 Learned APP has submitted that from the Dying Declaration of the deceased – wife recorded by the Executive Magistrate, it is evident that the deceased – wife had committed suicide on account of the constant physical and mental torture meted out by the appellant. He has further submitted that the medical evidence in the form of the Postmortem Report also supports the case of the prosecution. He has, therefore, submitted that the trial Court has rightly convicted the appellant for the offence punishable u/s. 498-A and 306 of the IPC.

4.2 Learned APP has further submitted that looking to the gravity of offence, the punishment imposed by the trial Court is on the lesser side. He has contented that the deceased – wife had committed suicide on the account of

the consistent mental and physical torture and instigation given by the appellant which is established from the evidence on record. He has, therefore, submitted that the impugned judgment and order passed by the trial Court is required to be modified by enhancing the sentence awarded by the trial Court.

5.0 We have heard learned counsel for the parties and perused the evidence on record. It is not in dispute that the appellant and the deceased - wife had a marriage life of about seventeen years prior to the date of incident and that out of the said wed-lock four children were born. The deceased – wife and the elder daughter - PW–1, were working in a chemical factory at the relevant point of time. From the evidence on record, it appears that on the date of the incident the appellant had gone to the place of employment of the deceased and had informed her to come back home. On her return to home along with PW - 1, some heated words were exchanged between the appellant and the deceased on account of which the

deceased consumed kerosene and poured kerosene on herself and set herself ablaze. Therefore, the question that is required to be considered by this Court is as to whether the deceased had committed suicide on account of the consistent mental and physical torture meted out by the appellant followed by the instigation to commit suicide.

6.0 The prosecution has examined the eldest daughter of the appellant and the deceased as PW – 1 at Exhibit – 7. In her deposition, the said witness has deposed that on the date of the incident when she and the deceased returned home from their place of employment, pursuant to the visit of the appellant at their factory calling upon the deceased to come back home, some quarrel took place between the appellant and the deceased. On witnessing the same, she went to call her younger brother and when her younger brother was not traceable, she went to call her fiance, who was working in a nearby factory. When they both returned home, they noticed that the deceased had sustained severe burn injuries and was lying on the bed. On

enquiring from the deceased about the reason for such extreme step, she was told that such action was taken on account of the torture extended by the appellant. Thereafter, she and her fiance took the deceased to the Civil Hospital where she, ultimately, succumbed to the injuries.

6.1 However, in her cross-examination, PW – 1 has narrated an altogether different story and has attempted to present a positive image of the appellant. She has deposed that the deceased was of a very quarrelsome nature and that she was never ready and willing to perform her marital obligations. She has deposed that the appellant had never extended any mental or physical torture to the deceased at any point of time.

6.2 This witness has tried to protect the appellant by pointing out loop-holes in the prosecution case. She has deposed that whenever the mother-in-law of the appellant used to come to their home, she used to instigate the

deceased against the appellant and tried to create a rift in the relationship of the deceased and the appellant as the deceased had married against her will and was never willing to accept the appellant as her son-in-law. She has further deposed that when her deceased - mother could not bear the mental pressure, she burnt herself after pouring kerosene and on witnessing the said incident, her grand-mother left the house. In her cross-examination, PW – 1 has further stated that the impugned complaint as well as the Dying Declaration was given by her grandmother and not by her deceased – mother. The aforesaid conduct of PW – 1 is clearly indicative of the fact that this witness has tried to protect the appellant from the alleged offence much less not to be declared as 'hostile' by the trial Court.

7.0 The prosecution has examined Arunbhai Bhimraobhai, PW – 2 at Exhibit – 8, with whom the eldest daughter of the appellant and the deceased was to get married. In his deposition, this witness has stated that on the date of incident, when he had reached the home of the

appellant, at that time, he noticed that the deceased was lying on the bed with severe burn injuries. When he asked PW – 1 about the reason for such action, PW – 1 informed him that the said step was taken was on account of the mental and physical torture meted out by the appellant. He has further deposed that on certain occasions, he had also noticed the appellant and the deceased quarreling with each other.

7.1 Here, it is pertinent to note that in his cross-examination, this witness has also narrated the same facts as has been stated by PW – 1 in her cross-examination.

8.0 The depositions of these two witnesses in their cross-examinations clearly lead us to believe that both these prosecution witnesses have attempted to make the prosecution case fragile by making statements which are contrary to what was stated by them in their depositions. It may be noted that in their depositions, both these witnesses have deposed in clear terms that the deceased had

informed them that she had attempted to commit suicide on account of the constant mental and physical torture meted out by the appellant and that it was because of the appellant that the deceased had taken such an extreme step. Now, if we read the depositions of these two witnesses as it is, then it is crystal clear that the deceased had committed suicide on account of the constant mental and physical torture meted out by the appellant. Thus, merely because these two witnesses have given different versions in their cross-examinations, it could not absolve the accused from his guilt. When these two witnesses have clearly deposed that they both were informed by the deceased herself about the cause of such extreme step when asked for by both of them, viz. the constant torture extended by the appellant, we are of the considered opinion that the depositions given by them in their cross-examinations would not be of any help in setting aside the conviction of the appellant.

9.0 The document at Exhibit – 12 is the Dying

Declaration of the deceased. The principle on which Dying Declarations are admitted in evidence is indicated in the legal maxim : "*Nemo moriturus praesumumur mentiri*" i.e. a Man will not meet his Maker with a lie in his mouth. The general principle on which this piece of evidence is admitted is that it is a declaration made in extremity ; so solemn and lawful it is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. It is an independent piece of evidence like any other piece of evidence – neither extra strong nor weak – and can be acted upon without corroboration if it is found to be otherwise true and reliable. By relying on the Dying Declaration alone, a conviction can be maintained.

9.1 It is settled law that conviction can be based on Dying Declaration, without any corroboration, if it is made voluntarily, without tutoring or prompting. Normally, a person on the verge of death is not likely to implicate innocent persons falsely but, at the same time, this statement is not

made before the Court on oath and the maker is not subjected to cross-examination. Therefore, the Court is required to scrutinize it carefully and if it is found truthful, then in that case, it can be acted upon and can also be used for recording a conviction. Once the statement of the dying person and the evidence of the witness / witnesses testifying to the same are found to be reliable on careful scrutiny, it becomes very important and a reliable piece of evidence and if, ultimately, the Court is satisfied that the Dying Declaration is true and free from any embellishment, then such a Dying Declaration by itself could be sufficient for recording conviction, even without looking for any corroboration.

9.2 In the instant case, inarguably, the Dying Declaration has been recorded in question and answer form, which is the proper method. The question that is required to be considered by this Court is as to whether the Dying Declaration can form the basis of conviction of the appellant, more particularly, when the depositions of PW – 1

& PW – 2 do not support the case of the prosecution, much less not to be declared as 'hostile' by the trial Court. A contention has been raised that the Dying Declaration given by the deceased is not independent but, a tutored one and, therefore, the same should not be accepted as a reliable piece of evidence. We have given our thoughtful consideration to the points urged by the learned Advocate for the appellant. Looking to the facts of the case, we are fully satisfied that the Dying Declaration was in itself enough to sustain conviction as there is ample corroboration to the same coming forth from the testimonies of PW – 1, PW – 2, PW – 3 and the complaint Exhibit – 23 filed by the deceased herself. The Doctor who has conducted the Postmortem of the deceased has been examined as PW – 9 at Exhibit 27. The Postmortem Report of the deceased show burn injuries as the cause of the death. Considering the evidence on record, we have no hesitation in arriving at the conclusion that the Dying Declaration recorded on 14.04.1994 is essentially an independent one and not tutored as contended by the learned Advocate for the appellant.

10.0 The prosecution has also examined the Executive Magistrate who has recorded the Dying Declaration of the deceased as PW – 3 at Exhibit – 10. The Investigating Officer who has recorded the complaint filed by the deceased at Exhibit – 23 has also been examined. Both these witnesses support the case of the prosecution and we find no infirmities in their depositions. Since the evidence discussed hereinabove are found to be sufficient in deciding the Appeals, we are not discussing the depositions of other witnesses as they are not of much relevance.

11.0 Considering the facts and circumstances of the case and the evidence available on record, we have no hesitation in holding that the deceased had committed suicide on account of the constant mental and physical torture and the instigation given by the appellant. We are in complete agreement with the reasonings given by and the findings arrived at by the trial Court and, therefore, find no reason to interfere with the same.

12.0 In the result, both the Appeals are dismissed. The impugned judgment and order dated 4th October, 1995 passed by the learned Addl. Sessions Judge, Court No. 18, City Civil and Sessions Court, Ahmedabad in Sessions Case No. 228 of 1994 is confirmed.

(Anil R. Dave, J.)

(K. S. Jhaveri, J.)

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